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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD A. McCARTHY & MARGARET C. McCARTHY,
Petitioners,

v.

DR. JOSEPH MENSCH, MERCY HOSPITAL, INC.,
DR. SHERIF SHAFEY and THE FLORIDA
PATIENTS COMPENSATION FUNDS,
Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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QUESTION PRESENTED

Did the Supreme Court of the state of Florida, in declaring unconstitutional, a statute governing the procedure and introduction of evidence in Medical Malpractice cases, properly decide that the statute, while unconstitutional under both the federal and state constitutions, could nevertheless apply to cases in which a decision of a Medical Malpractice panel had been filed prior to the date of the decision of the Supreme Court of Florida, despite the fact that such cases might still have been at some stage of litigation or appeal on said date?

The Supreme Court of the state of Florida answered this question in the affirmative in the case of Aldana v. Holub, Fla., 381 So. 2d 231 when it held that Medical Mediation Act of the state of Florida was unconstitutional as violative of the due process clauses of the United

States and Florida constitutions but limited its holding to prospective cases only in holding that in any case in which the written decision of the Medical Mediation panel had been filed with the clerk of the appropriate court on or before February 28, 1980 (the date of the Aldana decision) the finding could be introduced into evidence despite the constitutional infirmity of the entire Medical Mediation Process.

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Petitioners Richard A. McCarthy and Margaret C. McCarthy, by their attorney, HARRY R. POLLAK, petition for a Writ of Certiorari to review the Judgment of the Supreme Court of the State of Florida in this case which, in turn, affirmed the Judgment of the Circuit Court of the 11th Judicial Circuit of Florida (Dade County).

OPINIONS BELOW

The opinion of the Supreme Court of the State of Florida in this case in reported at Fla., ___So. 2d__(Mar. 18, 1982). The opinion in the case relied upon by the Supreme Court of Florida, Aldana v. Holub, is reported at Fla., 381 So. 2d 231 (1980).

JURISDICTION

This Court has jurisdiction in that, in Aldana v. Holub, supra, the Supreme Court of the State of Florida found a Florida statute to be violative of the due process clause of the United States Constitution and, in the instant case, relied upon Aldana v. Holub, supra, to deny relief to Petitioners since the declaration of unconstitutionality in Aldana v. Holub, supra, had been declared to be prospective only.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United

States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The Fourteenth Amendment to the United States Constitution made the Bill of Rights, including the Fifth Amendment, applicable to the states.

2. Section 768.47 et seq., Fla. Stat 75 (1979) provided:

> CIVIL MEDICAL MALPRACTICE ACTIONS; PROCEDURES; ADMISSIBILITY OF EVIDENCE
>
> (1). In the event any party rejects the decision of the Medical Liability Mediation Panel, the claimant may institute litigation based upon the claim in the appropriate court. Furthermore, in any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, insurance coverage, or joinder of the insurer as a co-defendant in the suit.
>
> (2). The conclusion of the hearing panel on the issue of liability may be admitted into evidence in any subsequent trial. However, no specific findings of fact shall be

admitted into evidence at trial. Parties may, in the opening statement or argument to the court or jury, comment on the panel's conclusion in the same manner as any other evidence introduced at trial. If there is a dissenting opinion, the numerical vote of the panel shall also be admissible. Panel members may not be called to testify as to the merits of the case. The jury shall be instructed that the conclusion of the hearing panel shall not be binding but shall be accorded such weight as they choose to ascribe to it.

(3). The provisions of this section shall not be applicable to any case in which formal suit has been instituted prior to the effective date of this section, which shall be July 1, 1975.

This statute was declared in violation of the due process clause of the United States and Florida Constitutions by the Supreme Court of the State of Florida in Aldana v. Holub, supra.

STATEMENT

While the Supreme Court of the State of Florida ruled that the statute in question (the Medical Mediation Act of the State of Florida) was unconstitution-

al, it stated that its decision was prospective only and that the findings of the mediation panel that were filed prior to February 28, 1980 could be used in any trial of actions based on civil tort involving medical malpractice. The Florida Court made no provision with regard to cases still in the litigation or appeal process such as the case in which petitioners were plaintiffs. In the instant case, the adverse finding of the Medical Mediation Panel was filed on March 2, 1979, and the trial of the case in which petitioners were plaintiffs commenced on January 7, 1980 and proceeded for five days. The case in which petitioners were plaintiffs was, therefore, on appeal when the Supreme Court of Florida, on February 28, 1980, found the Medical Mediation Act unconstitutional prospectively.

REASONS FOR GRANTING THE PETITION

As the Supreme Court of the State of Florida pointed out in their opinion herein:

> "The Constitutional issues in the present case are whether the application of section 768.47(2) denied plaintiffs their right to a trial by jury, to due process of law, and to equal protection of the law."

In Aldana v. Holub, supra, the same court had held that the entire Medical Mediation Act of the State of Florida (which included the section referred to above) was in violation of both the United States and the Florida Constitutions in that it denied due process to litigants.

Since, however, the Aldana case was held to be prospective only, and since petitioners herein had concluded the trial of the action below a few weeks prior to the Aldana Decision, they were denied the benefits that they would have received, had their litigation proceeded at a some-

what more leisurely pace.

The sole question that petitioners desire this Court to review is whether the finding of unconstitutionality in the Aldana case should have been prospective (as decided by the Florida Court) or whether it should have applied either to all cases or, at the very least, to those then actually in litigation at the trial or appeal level.

At one time, it was unquestionably the law that a finding of a constitutional infirmity was applicable to all cases past, present and future. As early as 1910, Mr. Justice Holmes wrote:

> "I know of no authority in this Court to say that in general state decisions shall make law only for the future. Judicial decisions have had retroactive operation for near a thousand years."

Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372

A landmark case in this Court, however, Great Northern Railway Co. v. Sunburst

Oil & Refining Co., 287 U.S. 358 was an instance in which a state court was upheld when, in announcing a change in law, the state court said that its decision was to have prospective validity only.

While the great majority of the cases recently before this Court dealing with the issue of prospective constitutional findings have been criminal cases in which there are strong policy considerations for avoiding retroactive application of a constitutional finding, this Court dealt with the issue of applicability of prospective constitutional findings in the case of Linkletter v. Walker, 381 U.S. 618 in which this Court set forth guidelines for determining whether or not a decision is to be applied retrospectively. Basically, the test laid down involves a balancing of the likely results to be achieved from applying the new judicial ruling retrospectively or prospectively

and (as in the Sunburst case) whether parties had relied on the prior rules which were now being declared invalid.

Linkletter v. Walker, supra was the first case in which the Court held that constitutional decisions need not be retroactively applied. The majority recognized that "heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule," 381 U.S. at 628.

Prior to Linkletter the Court applied the rule adopted in Mapp v. Ohio, 367 U.S. 643 to three cases pending on direct review on the date Mapp was decided. See Stoner v. California, 376 U.S. 483 (1964); Fahy v. Connecticut, 375 U.S. 85 (1963); Ker v. California, 374 U.S. 23 (1963).

In Chevron Oil Co. v. Huson 404 U.S. 97 (1971) a civil damages suit the Court did apply part of the Linkletter test. The modified Linkletter formula consid-

ered: 1) the novelty of the rule; 2) the purpose and effect of the rule and whether it would be furthered or retarded by retroactive application and 3) the inequity imposed by retroactivity. This is significant in that the purpose of a civil rule was being given great weight, whereas, under the older formulations applied to civil cases, reliance and stability were usually considered the main factors.

While there are cases holding that judicial decisions are to be applied retrospectively to all, cases holding that a decision shall be applied to the litigants before the Court and prospectively as to everyone else, and cases holding that decisions are to be applied entirely prospectively, there appears to be no authority in this Court for the position taken by the State of Florida in Aldana v. Holub, supra that in a civil

tort case, rather than in a criminal case, a finding of unconstitutionality shall not apply to cases not yet finally decided on appeal.

The landmark decision of Chief Justice Marshall in United States v. Schooner Peggy, 1 Cranch 103 (1801) establishes clearly that a change in the law is to be given effect in cases that are still on direct review in the courts. Mr. Justice Clark, writing for this Court 163 years later, made it clear that this was still the law in civil cases. Linkletter v. Walker, supra at 618.

While there may be some policy considerations for holding a finding of constitutional infirmity to be prospective only, in certain criminal cases and in certain types of civil cases where there has been reliance on the law now being overruled, former Chief Justice Roger J. Traynor of the California Supreme Court, in an

excellent analysis of the development of the law on this subject* states as follows:

> "In tort cases, however, it is my opinion that the hardship on parties who would be saddled with an unjust precedent if the overruling were not made retroactive, ordinarily outweighs any hardship on those who acted under the old rule or any benefits that might be derived from limiting the new rule to prospective operation. Neither the tort-feasor nor the victim normally takes account of expanding or contracting rules of tort liability except tangentially in the course of routinely insuring against such liability.
>
> In most cases, the expansion or contraction of tort liability has no drastic effect on the drafting and cost of insurance policies, but there may be exceptions. An agency, for example, relying on sovereign or charitable immunity under established law, may have deemed it needless to procure insurance. In the event of a judicial decision ruling against immunity such an agency would be unprepared to meet the newly created liability". (28 Hastings Law Journal at 545)

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*Traynor, "Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility." 28 Hastings Law Journal 533

The foregoing analysis would seem to reconcile the apparent disagreement between the reasoning in the Sunburst case and the reasoning in other cases in view of the policy considerations present in the Sunburst case. Even, however, if former Chief Justice Traynor is wrong and this Court were to hold that the Sunburst case precedent meant that this Court would not interfere in a ruling of prospective application only, this Court would still be bound by U.S. v. Schooner Peggy, supra, to at least apply the finding of unconstitutionality to cases such as that of petitioners which were still in the direct review process at the time that the change in law was enunciated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully sumbitted,

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Dated: June 1982

APPENDIX A

APPENDIX A
OPINION IN COURT BELOW

SUPREME COURT OF FLORIDA

No. 58,636

RICHARD A. McCARTHY and MARGARET C. McCARTHY, Appellants,

vs.

DR. JOSEPH MENSCH, MERCY HOSPITAL, INC., DR. SHERIF SHAFEY and THE FLORIDA PATIENTS COMPENSATION FUNDS, Appellees.

(March 18, 1982)

Alderman, J.

This is an appeal by plaintiffs in a medical malpractice case from a final judgment of the Circuit Court of Dade County in favor of the defendants. Since, in reaching its decision, the trial court upheld the constitutionality of section 768.47(2), Florida Statutes (1979), and since this appeal was filed prior to the 1980 amendment to article V of the Florida Constitution, we have jurisdiction pursuant to article 7, section 3(b) (1),

Florida Constitution (1972). We affirm.

Plaintiffs, before suing defendants, complied with the provisions of Florida's medical mediation act. The medical mediation hearing panel found that the defendants were not actionably negligent. Subsequently, plaintiffs began this lawsuit and asked the trial court to instruct the defendants not to refer during trial to the hearing panel's finding of no actionable negligence. They argued that to permit the conclusion of the hearing panel into evidence as provided by section 768.47(2) would be an

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Section 768.47(2) provides:

(2) The conclusion of the hearing panel on the issue of liability may be admitted into evidence in any subsequent trial. However, no specific findings of fact shall be admitted into evidence at trial. Parties may, in the opening statement or argument to the court or jury, comment on the panel's conclusion in the same manner as any other evidence introduced at trial. If there is a dissenting opinion, the numerical vote of the panel shall also be admissible. Panel members may not be called to testify as to the merits of the case. The jury shall be instructed that the conclusion of the hearing panel shall not be binding, but shall be accorded such weight as they choose to ascribe to it.

unconstitutional deprivation of their right to a trial by jury and a denial of their right to due process. Plaintiffs' motion was denied. Defendants introduced the panel's decision into evidence and, in their final argument to the jury, commented on it. The court instructed the jury, as required by section 768.47(2), that the conclusion of the hearing panel was not binding but was to be accorded such weight as they choose to ascribe to it. The jury returned a verdict for the defendants.

The constitutional history of Florida's medical mediation act is brief. As was stated in Carter v. Sparkman, 335 So. 2d 802 Fla. (1976), cert. denied, 429 U.S. 1041 (1977), at the time of its enactment, there was an imminent danger that a drastic curtailment in the availability of health care services would occur in this state. The legislature, recognizing the

crisis and the consequential need for legislation, sought to resolve the crisis through enactment of chapter 75-9, Laws of Florida. These statutory provisions required compulsory mediation of medical malpractice claims and were intended to reduce the cost of malpractice insurance and ultimately medical expenses.

Taking judicial notice of the "crisis" in the area of medical care, we upheld the validity of the medical mediation act as a legitimate exercise of the state police power. In Carter, we stated that "(a)lthough courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access, there may be reasonable restrictions prescribed by law." 335 So. 2d at 805. But we also noted that "the pre-litigation burden cast upon the claimant reaches the outer limits of constitutional

tolerance." Id. at 806.

Four years later, however, in Aldana v. Holub, 381 So. 2d 231 (Fla. 1980), this Court found that the practical operation and effect of the statute rendered it unconstitutional in its entirety as a violation of the due process clauses of the United States and Florida Constitutions. The inherent inflexibility of the absolute jurisdictional periods led us to conclude that section 768.44(3) served to deprive the petitioners in Aldana of due process, and we held these jurisdictional periods to be arbitrary and capricious in operation and to cause the statute to be intractably and incurably defective. We said, however, that our decision in Aldana would have prospective application only:

> In any case where the written decision of the medical mediation panel has been filed with the clerk of the court on or before the date this decision is filed (Feb. 28, 1980), a party may introduce that decision in evidence. In all

> other cases, medical mediation proceedings are hereby terminated and declared void as of the above filing date.

381 So. 2d at 238.

The constitutional issues in the present case are whether the application of section 768.47(2) denied plaintiffs their right to a trial by jury to due process of law, and to equal protection of the law. In resolving these issues, we find the decision of the United States Circuit Court of Appeals for the Fifth Circuit in Woods v. Holy Cross Hospital, 591 F.2d 1164, 1180 (5th Cir. 1979), to be persuasive, and we agree with its rationale.

In Woods, an Ohio resident and the administratrix of the estate of her late husband brought a medical malpractice action against two Florida physicians, a hospital, and their malpractice insurers seeking damages pursuant to the Florida

Wrongful Death Act. The federal trial court dismissed the action on the ground that plaintiff had failed to perform a condition precedent to her suit by not proceeding before a Florida medical mediation panel pursuant to the Florida medical mediation act. Plaintiff appealed, claiming that the admission into evidence of a hearing panel's findings on liability would so influence the jury that it would be unable independently to examine the question of liability, particularly since section 768.47 precludes the calling of panel members to testify regarding the merits of the case. This, she argued, would deny her right to a jury trial as provided by the seventh amendment of the United States Constitution. She also claimed that section 768.47 deprived her of due process and equal protection of the laws.

In finding the claimed denial of right

to jury trial untenable, the Fifth Circuit noted that section 768.47(2) provides: "The jury shall be instructed that the conclusion of the hearing panel shall not be binding, but shall be accorded such weight as they choose to ascribe to it". The Court then held:

> The parties to a malpractice dispute are free to present the same witnesses and exhibits before the trial jury that they presented to the mediation panel, and the jury may draw its own conclusions from their testimony, even if in so doing it rejects the panel's finding. We observe that the United States Supreme Court has on several occasions approved the admission of expert findings into evidence before a jury and has consistently rejected seventh amendment challenges to such a procedure.
>
> . . . .
>
> The mere unavailability of panel members for testimony at the subsequent trial does not render section 768.47 unconstitutional.

591 F. 2d at 1180. The Fifth Circuit also held that "the admissibility of mediation panel findings at a subsequent

trial does not unduly affect the fairness of that trial and therefore does not constitute a due process violation". 591 F. 2d at 1177. It also rejected plaintiff's contention that this section violated her right to equal protection of the laws.

We hold that section 768.47(2) does not contravene appellants' right to a trial by jury as guaranteed by article I, section 22 of the Florida Constitution. That right has not been abrogated by the statute; rather it has been specifically provided for therein. We also conclude that this section does not deny plaintiff due process of law.

Plaintiffs' final argument, that they were denied equal protection of the law because the defendants had the option of not participating in mediation while mediation was made mandatory for them, is without merit. We agree with the conclusion of the Fifth Circuit in Woods v. Holy

Cross Hospital, 591 F. 2d at 1175 n. 17, that this does not result in the denial of equal protection of the laws.

Accordingly, we affirm the judgment of the trial court.

It is so ordered.

SUNDBERG,C.J., OVERTON and McDONALD, JJ., Concur
ADKINS, J., Dissents